

Rule 18, Ariz. R. Crim. P.

MOTION IN LIMINE CONCERNING VOIR DIRE

The trial judge gives prospective jurors an impression of partiality towards the defense during voir dire when he specifically tells prospective jurors that “Police officers lie” and gives examples; therefore, the trial judge should not do so.

The State of Arizona, by and through the undersigned deputy, moves in limine for this Court to refrain from advising prospective jurors that “Police officers lie,” or words to that effect, and giving examples of specific instances in which law enforcement personnel have acted improperly. This motion is supported by the following Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Past experience with this Court

In another case in this Court, a prosecutor from this office observed that this Court, while conducting voir dire of the prospective jurors, asked them if they would automatically consider the testimony of police officers as more trustworthy than that of other witnesses. This Court went on to tell the jury that they should not do so, because police officers lie. The Court then gave specific examples of instances in which police officers had committed various acts of misconduct, mentioning, in particular, Mark Fuhrman from the O. J. Simpson murder trial. The State objected to this line of voir dire, but this Court did not grant any relief. The defendant in this cause number is now set for trial on (date), and the State expects that jury selection will begin on (date).

B. Argument

1. The trial judge must avoid even the appearance of impropriety in conducting voir dire.

Canon 2(A) of the Code of Judicial Conduct, Rule 81, Rules of the Supreme Court, requires judges to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 3(B)(9) provides in part:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

Judges must not only **be** impartial – they must also avoid any **appearance** of partiality and refrain from taking any action calculated to influence the jury. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). As the Kansas Supreme Court has noted, “The trial judge is not merely a moderator, but is the governor of the trial. The judge must strive to have the trial conducted in an atmosphere of impartiality and should refrain from remarks or conduct that may injure a litigant.” *State v. Sherrer*, 259 Kan. 332, 338, 912 P.2d 747, 753 (1996).

The Colorado Supreme Court has stated that courts “must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. ... [B]oth the actuality and appearance of fairness must be considered because the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would the actual presence of bias and prejudice.” *People v. Coria*, 937 P.2d 386, 391 (1997) [citations and internal quotation marks omitted].

Further, the Supreme Judicial Court of Massachusetts has noted that when “prejudicial remarks fall from the judge himself, the effect on the jury is likely to be more damaging [than the erroneous admission of testimony].” *Commonwealth v. D’Agostino*, 421 Mass. 281, 287, 657 N.E.2d 217, 221 (1995), *citing Commonwealth v. Goulet*, 374 Mass. 404, 414, 372 N.E.2d 1288 (1978). This is so because of the respect jurors have for the court.

A jury of laymen will often have an awesome respect for the institution of the American trial judge. This can lead them to accord great and perhaps decisive significance to the judge's every word and intimation. It is therefore essential that the judge refrain from any actions indicating any position other than strict impartiality.

Marcum v. State, 725 N.E.2d 852, 856 (Ind. 2000), *quoting Kennedy v. State*, 280 N.E.2d 611, 620-21 (1972).

2. Voir dire exists to identify persons who should be excluded from the jury for cause, not to influence jurors about the case.

“The goal of the juror selection process is to seat a fair and impartial jury in a non-discriminatory way.” *State v. Paleo*, 200 Ariz. 42, 44, ¶ 9, 22 P.3d 35, 37 (2001). The purpose of voir dire is to identify persons who should be excluded from the jury for cause. *State v. Wooten*, 193 Ariz. 357, 363, ¶ 28, 972 P.2d 993, 999 (App. 1998). See also *Morgan v. Illinois*, 504 U.S. 719, 734 n. 7 (1992) (“The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case.”) A potential juror who has preconceived notions or opinions about the case or issues involved in the case can be rehabilitated if voir dire questions indicate that the juror is willing to set aside those opinions and sit as a fair and impartial juror. *State v. Poland*, 144 Ariz. 388, 398, 698 P.2d 183, 193 (1985).

Rule 18.5, Ariz. R. Crim. P., governs the jury selection process. Rule 18.5(d) governs voir dire examination. That Rule requires the court to “conduct a thorough oral examination of prospective jurors.” While the rule clearly puts the burden of conducting *voir dire* on the court, the rule also states that, on any party’s request, “the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors.” As the Arizona Supreme Court explained in *State v. Anderson*, 197 Ariz. 314, 321, 4 P.3d 369, 376 (2000), the “clear language and intent of the present rule is that each party be given opportunity and reasonable time to question prospective jurors to discover information relevant to challenges and to possibly rehabilitate them.” If at any time during voir dire “cause for disqualifying a juror appears,” the court must excuse that juror for cause before the parties begin to exercise their peremptory challenges. Rule 18.5(f). “A trial judge must dismiss a prospective juror for cause only when ‘there is reasonable ground to believe that a juror cannot render a fair and impartial verdict.’ Ariz. R. Crim. P. 18.4(b).” *State v. Blackman*, 201 Ariz. 527, 533, ¶ 12, 38 P.3d 1192, 1198 (App. 2002)

The caselaw interpreting Rule 18.5 makes it clear that the parties, not the judge, should attempt to elicit information demonstrating that any particular juror is unsuitable and, if they choose, attempt to rehabilitate any such juror by asking further questions. As the Court of Appeals said in *Blackman, supra*:

The burden rests on a party seeking to exclude a potential juror to elicit information demonstrating the juror’s unsuitability. It is not the trial judge’s responsibility to conduct defense counsel’s case by devising and asking follow-up questions designed to exclude a presumptively qualified juror.

State v. Blackman, 201 Ariz. 527, 533, ¶ 29, 38 P.3d 1192, 1198 (App. 2002) [citations omitted].

As noted above, prospective jurors are naturally sensitive about what judges say. When a trial court judge tells jurors during voir dire that police officers lie in court and gives specific examples, the jurors are likely to suspect, first, that the case they are about to hear involves allegations that police officers are lying; and second, that the judge personally believes that some officer involved in the case has lied. But all witnesses are human, and **any** human being may lie or be mistaken – not just one class of witnesses. Singling out police officers, rather than any other type of witnesses, for special mention explicitly suggests to prospective jurors that they must treat one class of witnesses differently from any other class. The Court's statements could reasonably lead jurors to believe that they should cast a jaundiced eye toward police officers who testify and give their testimony special scrutiny, beyond that they would give to testimony given by any other category of witness. Further, this type of statement by a trial court judge is likely to contaminate the entire prospective jury panel and thereby deny the State a fair trial.

C. Conclusion

For the reasons stated above, the State asks this Court to refrain from singling out police officers in voir dire, so as to avoid even the appearance of impropriety.